Supreme Court, U
FILE
DEC 1 1 2003
OFFICE OF THE

No. 03-569

# In the Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
*Petitioner*,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
*Respondents*.

**On Petition for Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THOMAS M. PYPER
*Counsel of Record*

JEFFREY A. MCINTYRE
CYNTHIA L. BUCHKO
WHYTE HIRSCHBOECK DUDEK S.C.
ONE EAST MAIN STREET, SUITE 300
MADISON, WI 53703-3300
(608) 255-4440

*Counsel for Petitioner*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

## TABLE OF CONTENTS


Page

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI . . . . . 1

I. RESPONDENTS' CONTENTION THAT STATE UTILITY HOLDING COMPANY REGULATION SHOULD BE EXEMPT FROM *PER SE* COMMERCE CLAUSE SCRUTINY IS CONTRARY TO THIS COURT'S PRECEDENTS . . . . . 1

II. THE CONSTITIONAL ESTOPPEL DOCTRINE DOES NOT APPLY . . . . . 4

A. AEC Is Not Estopped From Challenging The Constitutionality Of The Wisconsin Statutes . . . . . 4

B. The Challenged WUHCA Statutes Are Severable . . . . . 8

CONCLUSION . . . . . 10

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Arnett v. Kennedy*, 416 U.S. 134 (1974) | 7 |
| *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) | 1, 10 |
| *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985) | 2 |
| *Brockert v. Skornicka*, 711 F.2d 1376 (7th Cir. 1983) | 7 |
| *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) | 1, 3 |
| *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) | 2, 3 |
| *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) | 1, 2, 3 |
| *Fahey v. Mallonee*, 332 U.S. 245 (1947) | 4, 7, 10 |
| *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) | 1-2, 3 |
| *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) | 7 |
| *North Am. Co. v. Securities and Exch.* | |

*Comm'n*, 133 F.2d 148 (2d Cir. 1943) . . . . . 5, 6

*State v. Hezzie R.*, 219 Wis. 2d 848,
580 N.W.2d 660 (1998) . . . . . 8

*United Parcel Serv., Inc. v. Mitchell*,
451 U.S. 56 (1981) . . . . . 4

*Village of Slinger v. City of Hartford*,
256 Wis. 2d 859,
650 N.W.2d 81 (Ct. App. 2002) . . . . . 9

**Statutes**

Wis. Stat. § 196.795, et seq. . . . . 5
Wis. Stat. § 196.795(2) . . . . . 6
Wis. Stat. § 196.795(3) . . . . . 1
Wis. Stat. § 196.795(5)(L) . . . . . 2
Wis. Stat. § 196.795(6m)(b) . . . . . 1
Wis. Stat. § 196.795(7)(a) . . . . . 1, 6
Wis. Stat. § 201.01(2) . . . . . 1, 6, 9
Wis. Stat. § 990.001(11) . . . . . 8

**Other**

1985 Wis. Act 79, § 1(5) . . . . . 9

1995 Wis. Act 351, § 41(5) . . . . . 8

Energy Policy Act of 2003, H.R. 6, 108th Cong.,
Subtitle B, §§ 221-241 (2003) . . . . . 5

Letter from Director, Division of Investment Management, Securities and Exchange Commission to Chairman, June 20, 1995, accompanying Securities and Exchange Commission – Division of Investment Management, *The Regulation of Public-Utility Holding Companies* (June 1995) . . . . . 5

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I. RESPONDENTS' CONTENTION THAT STATE UTILITY HOLDING COMPANY REGULATION SHOULD BE EXEMPT FROM *PER SE* COMMERCE CLAUSE SCRUTINY IS CONTRARY TO THIS COURT'S PRECEDENTS

Respondents attempt to disguise the challenged statutes' direct extraterritorial regulation of non-Wisconsin transactions between non-Wisconsin entities as mere "extraterritorial impact," which Respondents describe as an inevitable by-product of utility regulation that should be exempt from *per se* Commerce Clause scrutiny.[1] Resp. Br. at 10-11. If the Court accepts this assertion, it would signal a change in Commerce Clause jurisprudence. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983) ("[The Court's] constitutional review of state utility regulation . . . has not treated it as a special province insulated from our general Commerce Clause jurisprudence.").

Respondents' contention that the decision below does not conflict with this Court's extraterritoriality Commerce Clause precedents is simply wrong. This Court has relied extensively on the plurality opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982). *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986);

---

[1] The challenged statutes are Wis. Stat. §§ 196.795(3) (the "Takeover Statute"), 196.795(6m)(b) (the "Asset Cap") and 196.795(7)(a) and 201.01(2) (the "PSC Securities Regulation Statutes").

*Healy v. Beer Inst., Inc.*, 491 U.S. 324, 333, n.9, 336 & n.13 (1989).[2] Indeed, the *Healy* Court's articulation of *per se* extraterritoriality Commerce Clause principles expressly quoted from the *Edgar* plurality opinion. *See id.* at 333, n.9, 336 & n.13. Moreover, the challenged Wisconsin statutes directly regulate interstate commerce no less than the price affirmation statute in *Healy,* which required *per se* scrutiny. *Compare* App. at 30a-31a *with Healy*, 491 U.S. at 337-340.[3]

Finally, Respondents chastise Alliant Energy Corporation ("AEC") for arguing that the distinction between the plurality opinion in *Edgar* and the Court's holding in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), is that the Indiana Act in *CTS* applied only to Indiana corporations. According to Respondents, "[t]his Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws." Resp. Br. at 11. Respondents'

---

[2] Respondents also wrongly argue that the Seventh Circuit's decision is consistent with *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985), *cert. denied*, 474 U.S. 847 (1985). Resp. Br. at 6-9. In *Baltimore Gas*, the Fourth Circuit refused to extend the reach of the Maryland statute to foreign corporations, and, thus, the case is inapposite because, as construed, the Maryland statute did not regulate extraterritorially. *See id.* at 1423, n.12.

[3] Respondents' assertion that the constitutional infirmities of the In-State Incorporation Statute, Wis. Stat. § 196.795(5)(L), can be overlooked because it is necessary to save the otherwise unconstitutional challenged statutes, *see* Resp. Br. at 12-13, is a telling concession that even they are willing to admit that the challenged statutes may be unconstitutional. *See* AEC's Brief In Response To Conditional Cross-Petition For Writ of Certiorari.

contention is remarkable given that, before the district court, they reconciled *Edgar* and *CTS* just as AEC does:

> The Supreme Court's decisions in [*Edgar*] and [*CTS*] seem to establish that whether a state's general takeover statute can survive commerce clause scrutiny depends critically upon whether or not the statute applies only to corporations incorporated under the state's laws. The statute in *CTS* did only apply to in-state corporations and was affirmed; the statute in *Edgar* did not, and was struck down.

Defendants' Reply Brief in Support of Their Motion for Summary Judgment at 31 (N.R. 102). Even disregarding Respondents' wholesale departure from their position before the In-State Incorporation Statute was declared unconstitutional, they again fail to distinguish between direct extraterritorial regulation and extraterritorial impact. AEC is not contending that state regulation of utilities and their holding companies is restricted to entities incorporated in the state. Regulation of the in-state transactions of non-state utility entities is permissible because that involves only extraterritorial impacts. In contrast, regulation of the non-state transactions of non-state utility holding companies constitutes direct extraterritorial regulation and is *per se* invalid. *See Healy, supra; Brown-Forman, supra.*[4]

---

[4] *Amici curiae* Madison Gas & Electric Company and its holding company, MGE Corp. (collectively, "MGE"), argue that, despite the importance of the Commerce Clause issues presented, the Court should deny the Petition because AEC is currently incorporated in Wisconsin. *See* MGE Br. at 15, n.4. MGE's assertion implies that AEC has not suffered harm from the challenged statutes. AEC's Petition demonstrates otherwise. *See* Petition at 26-27 & n.8. The Seventh Circuit and Respondents

## II. THE CONSTITUTIONAL ESTOPPEL DOCTRINE DOES NOT APPLY

### A. AEC Is Not Estopped From Challenging The Constitutionality Of The Wisconsin Statutes

Relying on *Fahey v. Mallonee*, 332 U.S. 245 (1947), Respondents assert that AEC is estopped from challenging the unconstitutional Wisconsin statutes. Resp. Br. at 15-16. The *Fahey* Court considered the question of whether shareholders in a savings and loan association could challenge enforcement provisions of the Home Owners' Loan Act. *Fahey*, 332 U.S. at 255. The Court reasoned that the "constitutional estoppel" doctrine prevents attack on the "constitutionality of a statute at the instance of one who has availed himself of its benefits" where the challenged enforcement provisions were not "*severable from those provisions which grant [the association's] right to exist*" because management abuses could then continue without recourse. *Id.* at 255-56

---

below acknowledged the challenged statutes' interference with AEC's ability to participate in the interstate utility investment market. *See* App. at 14a, n. 4, 32a; Appellees' Br. at 32. In view of the impact the Seventh Circuit's erroneous decision is already having on the interstate utility investment market, AEC's place of incorporation is not a reason for this Court to deny the Petition. *See* Brief of *Amici Curiae* Edison Electric Inst., *et al.*, at 18 & nn. 18-19 (noting that Arizona regulators have relied on the Seventh Circuit's decision in defending their right to approve and condition a merger between a German company and a non-resident holding company with water utilities). In any event, the Court should ignore MGE's argument because it was not advanced by Respondents. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981).

(emphasis added) (internal quotation omitted). No such circumstances exist here.

In *North Am. Co. v. Securities and Exch. Comm'n*, 133 F.2d 148 (2d Cir. 1943), a utility holding company ("NAC") challenged the validity of one section of the Public Utility Holding Company Act of 1935 ("PUHCA"), the federal counterpart to the Wisconsin Utility Holding Company Act, Wis. Stat. § 196.795, et. seq. ("WUHCA").[5] Relying on this Court's authority, the Second Circuit held that NAC's registration under PUHCA, which resulted in it becoming a

---

[5] *Amici* MGE advances the findings underlying PUHCA and the potential repeal of PUHCA as reasons why state regulation like the challenged statutes should be upheld. MGE's view is at odds with the Securities and Exchange Commission, the agency which administers PUHCA: "We believe that [PUHCA] is unnecessarily restrictive in many regards, and may prevent companies from responding effectively to the changes now occurring in the utility industry. These effects, we have concluded, are clearly detrimental to both investors and consumers." Letter from Director, Division of Investment Management, Securities and Exchange Commission to Chairman, June 20, 1995, accompanying Securities and Exchange Commission – Division of Investment Management, *The Regulation of Public-Utility Holding Companies* (June 1995) (recommending repeal of the 1935 Act), *available at* http://www.sec.gov/news/studies/puhc.txt. While the current Energy Bill before Congress would repeal the 1935 Act, it would be replaced with the Public Utility Holding Company Act of 2003, with regulatory authority shifted to the Federal Energy Regulatory Commission and enforcement mechanisms to prevent improper affiliate transactions. *See* Energy Policy Act of 2003, H.R. 6, 108th Cong., Subtitle B, §§ 221-241 (2003). Moreover, whatever Congress decides to do regarding PUHCA under its authority to regulate interstate transactions, its action cannot be construed as a delegation to states to directly regulate interstate commerce as MGE seems to be contending.

"registered holding company" under the meaning of section 11(b)(1) of PUCHA, "did not waive its right to future challenge of the validity of section 11." *Id.* at 150, n.2. To the extent NAC could be said to owe its existence to PUHCA, it was still able to challenge the constitutionality of other PUHCA provisions.

AEC is no different than NAC. AEC was not created by WUHCA or any of the statutes it challenges. AEC, then known as WPL Holdings, was a Wisconsin corporation formed under Wis. Stat. Ch. 180 before WUCHA's enactment. *See* N.R. 085 at ¶ 3. Prior to WUHCA, it was unclear whether the PSC even had authority to regulate utility holding companies because no law addressed the formation of utility holding companies. Thus, WUHCA is best described as legislation that only clarified the PSC's authority in this area. *See* N.R. 070 at ¶¶ 9-15. After WUHCA's passage, AEC merely acquired a certificate of approval to operate as a utility holding company, just like NAC in *North Am.* was required to register under PUHCA. *See* Wis. Stat. § 196.795(2). That certificate statute is not being challenged here, and just as NAC could challenge other PUCHA sections, the constitutional estoppel doctrine does not prevent AEC's challenge to unrelated WUHCA sections.[6]

---

[6] The PSC Securities Regulation Statutes provide that, if any of AEC's investments fall outside the four categories found in Wis. Stat. § 196.795(7)(a), it becomes a public service corporation regulated under Wis. Stat. Ch. 201. The triggering statute is Wis. Stat. § 201.01(2), which merely references the WUCHA provision. No argument can be made that AEC was created under, or has ever benefited from, the PSC Securities Regulation enforcement provisions of Wis. Stat. Ch. 201 because they are not even WUHCA provisions.

Moreover, the estoppel doctrine has been limited and questioned by numerous courts, including this Court and the Seventh Circuit. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 456-57 (1988) (raising "doubt" that *Fahey* "generally forbid[s] [plaintiffs] from challeng[ing] a statute simply because they are deriving some benefit from it"). In *Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983), the plaintiff, a former city employee, once benefited from an exemption to a residency requirement. When the City eliminated his position after his residency exemption had expired, he challenged his dismissal. Noting that the *Fahey* estoppel "'doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach,'" the Seventh Circuit rejected the City's estoppel argument:

> [W]ere defendants' argument accepted, a party in plaintiff's position could never challenge the ordinance: if he attempted to invalidate the waiver provision prior to applying for it, there would be no controversy; having once applied and received the exemption and its benefits, he would be estopped from challenging it. In sum, plaintiff is not precluded from challenging the ordinance because he once benefitted from it.

*Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974)). That reasoning applies equally here. If the estoppel doctrine applied, a utility holding company would have only two choices: (1) stay out of Wisconsin; or (2) operate under unconstitutional regulation. As the *Brockert* court reasoned,

the estoppel doctrine was not intended to so insulate invalid regulation.[7]

### B. The Challenged WUHCA Statutes Are Severable

The challenged statutes are severable from the fully protective, unchallenged provisions of WUHCA. Wis. Stat. § 990.001(11), enacted in 1951, provides:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Thus, Wisconsin's Legislature has created a presumption of severability. WUHCA does not contain a nonseverability provision and the unchallenged WUHCA provisions that fully regulate holding companies "can be given effect" without the challenged provisions. *See, e.g., State v. Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998) (holding unconstitutional section of the Wisconsin Juvenile Justice Code's severable). If Wisconsin's Legislature had wanted to make the provisions of WUHCA nonseverable, it knew how to do so. *Cf.* 1995 Wis. Act 351, § 41(5) ("Nonseverability: Notwithstanding section 990.001(11) of the statutes, if it is

---

[7] The Seventh Circuit did not invoke the estoppel doctrine. Thus, denying the Petition for a reason not even relied on by the Seventh Circuit would allow its flawed decision on the Commerce Clause to continue to cause confusion in, and unconstitutional state regulation of, the utility industry.

finally adjudicated that any provision of this act is unconstitutional, the entire act is void."). In enacting WUHCA, the Legislature chose not to make its sections nonseverable and it "is presumed to know the status of existing law . . . and to have chosen its words carefully . . . ." *Village of Slinger v. City of Hartford*, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (Ct. App. 2002) (internal quotation omitted).[8]

WUHCA's legislative purpose can be achieved without the challenged statutes. Wisconsin's interest in ensuring safe, reliable and reasonably priced electric service to Wisconsin ratepayers will be fully protected by numerous, unchallenged WUHCA provisions. *See* Petition, Part II. Moreover, invalidating the challenged statutes would not contravene the stated legislative purpose of WUHCA. According to the Wisconsin Legislature, one of WUHCA's stated goals is to promote business activity by utility holding companies, which will be advanced by invalidating the challenged statutes. *See* 1985 Wis. Act 79, § 1(5). Other than characterizing WUHCA as a "legislative compromise" – a statement which can describe any piece of legislation – Respondents have offered no reason to overcome the statutory presumption of severability.

The energy industry and the interstate utility investment market have changed dramatically since WUHCA's enactment in 1985. *See, e.g.*, N.R. 078 at ¶ 8. AEC was not created under the challenged statutes, has not directly benefited from

---

[8] The PSC Securities Regulation enforcement provisions are indisputably severable from WUHCA because they are not contained in WUHCA. Instead, they are found in Wis. Stat. Ch. 201.

them and the challenge statutes are entirely severable from the remaining WUHCA provisions. The *Fahey* estoppel doctrine simply does not apply. Denying AEC's Petition would let stand a decision that directly conflicts with this Court's extraterritoriality cases and would create, contrary to this Court's directive in *Arkansas Electric*, a general exemption to *per se* Commerce Clause scrutiny for state utility holding company regulation. Left uncorrected, the Seventh Circuit's decision will have (and is having) an adverse, unconstitutional impact on a broad spectrum of industries operating in interstate commerce. In order for these conflicts and the uncertainty caused by the decision below to be eliminated, the Petition should be granted.

## CONCLUSION

For the reasons stated in the Petition and in this Reply, AEC respectfully requests that the Court grant the Petition.

Respectfully submitted,

THOMAS M. PYPER
*Counsel of Record*

JEFFREY A. MCINTYRE
CYNTHIA L. BUCHKO
WHYTE HIRSCHBOECK DUDEK S.C.
ONE EAST MAIN STREET, SUITE 300
MADISON, WI 53703-3300
(608) 255-4440

*Counsel for Petitioner*